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# In the Supreme Court of the United States

OCTOBER TERM, 1996

HOLSUM BAKERS OF PUERTO RICO, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by discharging an employee because he was discussing renewal of a campaign to organize petitioner's employees.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is unpublished, but the decision is noted at 107 F.3d 922 (Table). The decision and order of the National Labor Relations Board (Supp. App. A1-A2) and the decision of the administrative law judge (Supp. App. A3-A28) are reported at 320 N.L.R.B. 834.

### JURISDICTION

The judgment of the court of appeals was entered on January 10, 1997. A petition for rehearing was denied on March 10, 1997. Pet. App. A17-A18. The petition for a writ of certiorari was filed on June 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner, a bakery in Puerto Rico, employed Carmelo Rivera-Rodriguez (Rivera) as a general helper in its production department. Pet. App. A3. In 1993, Rivera was active in a union organizing drive among petitioner's employees. That drive culminated in defeat for the union in an election held in September 1993. *Ibid.*; Supp. App. A3-A5.

In late 1993 or early 1994, after the union election, an employee reported to petitioner that Rivera had stated that he would not buy petitioner's products or give them to his family "because they had poison and they would poison them." Pet. App. A8; see *id.* at A7-A10, Supp. App. A10-A11, A15. Petitioner took no disciplinary action against Rivera at that time. Pet. App. A7; Supp. App. A15. In August 1994, with the anniversary of the union's election defeat approaching, another employee reported that Rivera had said that he would not give petitioner's products to his family, that they "were garbage, and that even the pigs did not eat them." Pet. App. A9; Supp. App. A9. That employee also reported that Rivera was discussing the possibility of a second union campaign. Pet. App. A7, A9; Supp. App. A9. Petitioner then conducted an investigation, at the end of which it discharged Rivera on September 29, 1994. Supp. App. A9-A12; Pet. App. A6, A9.

2. In subsequent proceedings before the National Labor Relations Board (Board), an administrative law judge (ALJ) found that Rivera had made the negative comments alleged by petitioner, and that in doing so he was not engaged in activity protected by the National Labor Relations Act. Supp. App. A11-A13. The ALJ pointed out, however, that petitioner had

stipulated both that it was aware of Rivera's union activity and that it was hostile to the union and to activities on its behalf. *Id.* at A5, A15. The ALJ held that those stipulations, together with the evidence that petitioner had discharged Rivera shortly after being informed that he was talking about renewing the campaign for union representation, made out a prima facie case that petitioner had discharged Rivera on account of his union activity. *Id.* at A14-A15.

The ALJ concluded that petitioner had failed to rebut the resulting inference of improper discharge, because it had not shown that Rivera would have been discharged in any event. Supp. App. A15. In particular, the ALJ noted that although Rivera's most critical statements, including that petitioner's products were "poison," were reported to petitioner by early 1994, petitioner took no action against Rivera until several months later, when it learned of less critical comments that were coupled with statements raising the possibility of another union campaign. *Id.* at A15-A16. Given the sequence of events, the ALJ found that "Rivera was discharged because of his renewed union activity, * * * and not because of the negative statements he made regarding [petitioner's] products." *Id.* at A16. The ALJ therefore recommended entry of an order requiring petitioner, among other things, to offer Rivera reinstatement and make him whole for any loss of earnings resulting from his discharge. *Id.* at A24-A28.[1]

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[1] The ALJ also concluded that a separate disciplinary warning issued to Rivera was motivated by his union activity. Supp. App. A17-A18. The court of appeals held that there was

The Board affirmed the ALJ's findings and adopted his recommended order. Supp. App. A1-A2.

3. The court of appeals enforced the Board's order in relevant part. Pet. App. A1-A14; see note 1, *supra*. After reviewing the record (Pet. App. A7-A10), the court held that there was sufficient evidence to support the Board's conclusion that petitioner's stated reason for discharging Rivera was pretextual, and that he was actually fired because he was contemplating a renewed attempt to unionize the company (*id.* at A6-A7, A9-A10).

## ARGUMENT

1. Petitioner contends (Pet. 8-10) that Rivera's statements disparaging petitioner's product removed him from the protection of the National Labor Relations Act. It is true that an employer may, without violating the Act, discharge an employee who publicly disparages the employer's product, if the discharge is based solely on that conduct and the conduct is unrelated to the employee's working conditions or to a current labor dispute. See, *e.g.*, *NLRB* v. *Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 471 (1953) ("sharp, public, disparaging attack" on quality of employer's broadcasts was "cause" for discharge under 29 U.S.C. 160(c)); *George A. Hormel and Co.* v. *NLRB*, 962 F.2d 1061, 1064 (D.C. Cir. 1992) ("Nothing in the Act prevents an employer from disciplining or discharging an employee for disloyalty."). In this case, the Board agreed that Rivera's dis-

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insufficient evidence to support that conclusion (Pet. App. A4-A6), and it is not at issue here. The ALJ's rejection, in a consolidated proceeding, of various objections lodged by the union with respect to the 1993 election (Supp. App. A3, A18-A24) are likewise not at issue.

paragement of petitioner's products was unprotected. Supp. App. A1, A12-A13. It found, however, that petitioner discharged Rivera, not because of that disparagement (which was confined to remarks made to fellow employees, who were evidently familiar with Rivera's status as a disgruntled union partisan), but because of his protected union activity. *Id.* at A15-A16. On that view of the facts, Rivera's discharge plainly violated the Act. The court of appeals found sufficient evidence in the record to support the Board's factual conclusion (Pet. App. A9), and the matter does not merit further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. Petitioner particularly protests the Board's order that Rivera be reinstated. See Pet. 9-13. That argument comes too late. Petitioner has not previously challenged reinstatement as an appropriate remedy, either before the Board or before the court of appeals, and the court of appeals did not address the issue of its own accord. Petitioner may not raise the issue for the first time in this Court. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Indeed, because the remedial issue was not raised before the Board, this Court lacks jurisdiction to consider it. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982) (applying 29 U.S.C. 160(e) ("[N]o objection that has not been urged before the Board * * * shall be considered by the court [of appeals], unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.")).[2]

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[2] Petitioner's general exception to the ALJ's recommended order was not sufficiently specific to preserve the remedial issue. See *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255-

In any event, petitioner's arguments against reinstatement are without merit. Although the ill-tempered griping reflected by the ALJ's findings of fact might have justified petitioner in disciplining or even terminating Rivera, had petitioner in fact acted on that basis (compare Pet. App. A4-A6), it bears scant resemblance to the illegal strike or picketing activity at issue in the Board decisions that petitioner cites (Pet. 8-10). Nor is this case, which involved Rivera's reinstatement as a "general helper" in petitioner's bakery (Pet. App. A3), similar to *Diamond Walnut Growers, Inc.* v. *NLRB*, 113 F.3d 1259 (D.C. Cir. 1997) (en banc), which upheld an employer's decision to assign an employee returning voluntarily from a strike to a different type of job because her public distribution of leaflets alleging that the employer's "scab" workers "packaged walnuts contaminated with 'mold, dirt, oil, worms and debris'" (*id.* at 1261) would have presented "a rather acute and unusual conflict of interest" with her previous quality-control responsibilities, *id.* at 1268.[3] With regard to petitioner's attempted reliance (Pet. 10) on the Federal Anti-Tampering Act, 18 U.S.C. 1365(c)(1), the ALJ correctly observed that there has never been any finding that Rivera violated that Act, and that "any conclusion that his rhetoric amounted to a knowing communication that [petitioner's] products had been tainted would be strained." Supp. App. A16.

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256 (1943); see also *May Dep't Stores Co.* v. *NLRB*, 326 U.S. 376, 386 n. 5 (1945).

[3] Even if the decision in this case did conflict with that of the same court in *Diamond Walnut*, the matter would be one for resolution by the court of appeals. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

And, finally, this Court has made clear that the Board may order an employee's reinstatement even if it concludes, as the ALJ did in this case (*id.* at A11), that the employee has testified falsely in proceedings before the Board. *ABF Freight System, Inc.* v. *NLRB*, 510 U.S. 317, 323-325 (1994).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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